Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	)))))	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
In the Matter of Distribution of 1999-2009 Satellite Royalty Funds	)))))	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)

INDEPENDENT PRODUCERS GROUP's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PROPOSED FINDINGS OF FACT

I. <u>HISTORY OF PROCEEDINGS</u>.

1. By notice published in the Federal Register on August 16, 2013, the Copyright Royalty Judges ("Judges") initiated the Phase II proceedings for the distribution of 2004-2009 cable retransmission royalties and 1999-2009 satellite retransmission royalties.[1] CRB 4 (cable/satellite).[2] Multiple parties filed their Notice of Intent to Participate in Phase II distribution proceedings relating to claims in one or more of the Devotional Programming category, Program Suppliers category, and Sports Programming category. CRB 5-13 (cable/satellite).

2. On September 23, 2013, the Judges gave notice of the commencement of the voluntary negotiation period, and issued their *Case Scheduling Order*. CRB 15 (cable/satellite).

3. On September 30, 2013, the Judges issued an *Order Requiring More Specific Statement*, which was amended on November 1, 2013, requiring all

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[1] *See* 78 Fed. Reg. 50113 (cable) and 78 Fed. Reg. 50114 (satellite).

[2] Numeric citations are to the 2004-2009 cable and 1999-2009 satellite dockets, respectively. All numeric references preceded by a "c" refer to the consolidated docket for 2004-2009 cable and 1999-2009 satellite. All

participating parties to submit additional information relating to their asserted claims. CRB 17, 38 (cable/satellite).

4. On December 11, 2013, IPG and the JSC filed a joint motion to stay any proceedings relating to the distribution of Sports Programming royalties, which motion was denied by order of February 4, 2013. CRB 61, 80 (cable/satellite).

5. On May 9, 2014, *Direct Statements* were filed by Independent Producers Group ("IPG"), the Motion Picture Association of America ("MPAA"), the Settling Devotional Claimants ("SDC"), and the Joint Sports Claimants ("JSC"). CRB 96-99 (cable/satellite).

6. On July 8, 2014, IPG, MPAA, and SDC filed *Amended Direct Statements*. CRB 136-138 (cable), 140-141 (cable/satellite).

7. On August 29, 2014, the Judges granted the motion of the JSC to dismiss all IPG claims in the Sports Programming category, and to distribute all remaining monies allocable to the Sports Programming category to the JSC. CRB 159 (cable); CRB 161 (satellite).

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citations to the record as of January 1, 2018 are to the docket number assigned by the eCRB system.

7. On August 29, 2014, the Judges consolidated the 2004-2009 cable and 1999-2009 satellite proceedings into a single proceeding. CRB 160A (cable).

8. On October 15, 2014, the parties filed rebuttal statements on claims issues. CRB c172-175. Hearings addressing such challenges occurred on December 8-11, 15-16, 2014. CRB c200. On March 15, 2015, the Judges issued their *Memorandum Opinion and Ruling on Validity and Categorization of Claims*. CRB c216.

9. On or about March 26, 2015, the parties filed their rebuttal statements on distribution issues. CRB c221-223, 225-231, 235, 239. Hearings addressing the distribution issues occurred on April 13-17, 2015.[3]

10. On May 4, 2016, the Judges issued their *Order Reopening Record and Scheduling Further Proceedings*, remanding the matter for further proceedings. CRB c309. Therein, the Judges articulated their criticisms of methodologies presented by the MPAA, the SDC, and IPG, and asserted:

> "Having considered the entire record in the proceeding, the Judges find that no party has presented a methodology and data that, together, are sufficient to support a final distribution in the contested categories.

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[3] Transcripts of the hearings occurring on April 13-17, 2015 did not appear on the docket sheet.

> The shortcomings of the parties' presentations leave the Judges without a sufficient record to render a reasoned determination for a proper distribution of royalties. *See* 17 U.S.C. § 803(c)(3); *Settling Devotional Claimants v. Copyright Royalty Bd*., 797 F.3d 1106, 1121 (D.C. Cir. 2015)."

11. On August 22, 2016, *Direct Statements (Remand)* were filed by IPG, the MPAA, and the SDC. CRB c317-319.

12. On October 20, 2016, IPG filed a *Motion to Amend Direct Statement (Remand)*, which was granted on January 10, 2017. CRB c338(a), c357.

13. On December 15, 2017, the parties filed their rebuttal statements on distribution issues. CRB c377,379.

14. On April 4, 2018, the SDC and MPAA filed a *Joint Motion In Limine and Motion for Summary Disposition as a Paper Proceeding*. CRB 2324.

15. On April 6, 2018, the Judges issued their *Order Granting In Part Joint Motion In Limine and Denying Joint Motion for Summary Disposition*, excluding from admission all documents and testimony designated in IPG's *Amended Direct Statement*, including testimony that is part of the record in this proceeding. CRB 2400.

16. Hearings addressing the distribution issues occurred on April 9-10, 2018.

II. MPAA METHODOLOGY

17. Paul Lindstrom ("Lindstrom") provided both written and oral testimony on behalf of the MPAA. Exh. 8001; Tr. at 281-367.

18. Dr. Jeffrey Gray ("Gray") provided both written and oral testimony on behalf of the MPAA. Exh. 8002; Tr. at 370-488.

A. Dr. Gray's methodology relies on and integrates three different varieties of Nielsen viewership data. Following the *Order Reopening Record*, the MPAA only added 2008-2009 distant data for purposes of averaging mathematical relationships with 2000-2003 distant data, i.e., data that could only nominally affect Dr. Gray's calculations.

19. In this remand proceeding, Nielsen provided the MPAA with three different types of data for the construction of the Gray methodology: (i) custom distant diary data for 2000-2003, (ii) custom distant National People Meter data for 2008-2009, and (iii) Local Ratings Data for 2000-2009. Exh. 8001 at 4-7; Exh. 8002 at 17-19.

20. In response to the *Order Reopening Record*, the only change to Gray's analysis was the addition of Nielsen 2008-2009 National People Meter distant viewing data. Tr. at 394:24-395:7. No data was added for calendar years 2004-2007. Tr. at 396:17-21.

21. MPAA could have performed a National People Meter distant viewing analysis for each of the years 2000-2009, but contended that it was

"difficult" but not "impossible" given the three-month timeframe afforded by the Judges following the *Order Reopening Record*. Tr. at 310:6-311:13.

22. The addition of Nielsen 2008-2009 National People Meter distant viewing data was only for the purpose of calculating mathematical relationships between such distant data and local ratings data, in order to be averaged with Nielsen 2000-2003 diary data utilized for the same purpose (see infra).

23. Across all programs, using 2000 satellite broadcasts as an example, various metrics used by Gray conclude that IPG is entitled 3.37%, 1.8%, and 1.3% of the 2000 satellite pool. However, Gray's methodology concludes that IPG is entitled only 0.46% of the 2000 satellite pool. Consequently, Gray's methodology concludes that any broadcast of an IPG-represented program received, on average, less than one-third of the viewership of a broadcast of any MPAA-represented program during 2000. Tr. at 413:8-414:13.

24. Across all programs, if there were a competing claim to a program between IPG and the MPAA, Gray automatically awarded it to the MPAA. Tr. at 414:20-25.

B. The Gray methodology relies on a sliver of data, then supplants such data with Dr. Gray's prediction of what such data *should* have been.

25. Based on approximately 6% of the *distant* retransmitted broadcasts from 2000-2003, and 6% of *distant* retransmitted broadcasts from 2008-2009, i.e., those with a positive measurement of distant viewership (see infra), and no measurement of *distant* viewership for cable or satellite retransmitted broadcasts from 2004-2007 (see infra), Gray calculated mathematical relationships for the metrics (i) local ratings of the program, (ii) distant subscribers to the retransmitted station, (iii) the time of day of the broadcast, (iv) the type of program aired according to Tribune characterization, (v) the station affiliate (i.e., whether the station was a network, the CW network, or an Independent; Exh. 8002 at App. D-1, D-2), and (vi) the fees paid by CSO/SSOs in the year of broadcast. Exh. 8002 at 27; Tr. at 432:4-10, 435:13-436:14, 446:9-21.

26. Notwithstanding, in calculating the mathematical relationships, Gray did not have Nielsen 2000-2009 local ratings data for each of the stations for which Gray had distant viewership data, and for which he sought to predict distant viewership. For example, while Gray sought to predict distant viewership for broadcasts appearing on 122 cable retransmitted stations

during 2004, Gray only had local ratings data from 56 markets, and conspicuously failed to clarify what number of the 122 sampled cable retransmitted stations were covered by such markets. *Cf*. Exh. 8002, App. B *with* App. C-1, C-2.

27. Nielsen local ratings data only exists in larger markets. Consequently, while Gray attested that his study was based on a stratified sample of stations that were being distantly retransmitted, his data was actually derived from a non-random sample of station data taken from the 56 largest U.S. markets. Tr. at 477:1-16, 181:18-25; Exh. 8002, App. B.

28. In the event that Gray did not have local ratings data for the sampled stations for which he sought to predict distant viewership, Gray imputed the retransmitted broadcasts with the average local rating for programs of the same program type (according to Tribune data) that are being broadcast during one of six daypart timeslots. Exh. 8002 at fn. 41.

29. Gray presents no evidence demonstrating what number of positive-measured *distant* measurements from 2000-2003 and 2008-2009 (i.e., non-"zero viewing" measurements), were used to define the mathematical relationships for the metrics. Nor does Gray present evidence whether such measurements were proportionate between broadcasts for IPG programming

and MPAA programming. Exh. 8002; Tr. at 370-488. See also, discussion infra re: “zero viewing”.

30. Gray presents no evidence demonstrating what number of positive-measured *distant* measurements from 2000-2003 and 2008-2009 (i.e., non-“zero viewing” measurements), were used to define the mathematical relationships with non-imputed local ratings measurements. Nor does Gray present evidence whether such measurements were proportionate between broadcasts for IPG programming and MPAA programming. Exh. 8002; Tr. at 370-488. See also, discussion infra re: “zero viewing”.

31. Gray presents no evidence demonstrating what percentage that the positive-measured *distant* broadcasts from 2000-2003 and 2008-2009 (i.e., non-“zero viewing” measurements) were of the aggregate (i.e., positive-measured and unmeasured) *distant* broadcasts of cable and satellite from 2000-2009. Nor does Gray present evidence whether such percentages were proportionate between broadcasts for IPG programming and MPAA programming. Exh. 8002; Tr. at 370-488. See also, discussion infra re: “zero viewing”.

32. Notwithstanding, based on the mathematical relationships, including Gray’s imputed local ratings measurements, Gray then predicts distant

viewership to *all* distantly retransmitted broadcasts appearing in Gray's sampled stations. Exh. 8002 at 28. Consequently, when distant viewership is predicted by using an imputed local rating, then the same indicia that resulted in the imputed local rating (e.g., program type, daypart) are *again* used to predict distant viewership, effectively double-factoring the same indicia as part of the prediction of distant viewership.

33. Using 2000 satellite as an example, Gray is asserting a correlation between local ratings and distant viewership for IPG-represented programming based on approximately 6% of the *distant* retransmitted broadcasts that recorded a positive measurement of distant viewership (see supra, infra), reduced by an unknown percentage of broadcasts for which Gray did not have Nielsen local ratings data because the broadcasts appeared on stations not appearing in the top 56 U.S. media markets (see supra), and then asserts a correlation for what Gray's "volume" measurements reflect are only 3.37%, 1.8%, and 1.3% of the 2000 satellite pool (see supra).

34. Gray supplants the Nielsen distant viewership *actually* measured, with his *prediction* of viewership. Tr. at 423:10-13. If both local ratings data and distant viewership data reflected zero viewing, Gray nonetheless imputed a positive figure to both local ratings and distant viewership. Tr. at 420:7-16.

35. Regressions are ultimately calculating averages of positive figures. Tr. at 425. Consequently, after imputing his projections of distant viewing, purportedly less than 1% of Gray's imputed distant viewing reflects "zero viewing". Tr. at 421:16-422:1. While Gray is imputing his *prediction* of distant viewing for 100% of the retransmitted broadcasts, he is imputing a positive viewership figure in no less than each of the 94% (see infra) of occasions in which there is no positive distant viewership figure that has been measured during 2000-2003 and 2008-2009, and 100% of all 2004-2007 retransmitted broadcasts.

36. In effect, the local viewership rating for any retransmitted broadcast considered by the Gray methodology is imputed by using a series of averages of positive figures, allowing a positive figure to result even when there is no positive local viewership rating. Further, the Gray methodology necessarily imputes a positive distant viewership figure even when a distant viewership figure is either unmeasured or has been measured as a "zero". Exh. 8002 at fn. 41.

37. Mathematically, if all the criteria utilized to impute a local rating is based on averages of positive figures, then is factored against other positive figures in order to predict distant viewership, it is a foregone conclusion that

there is a positive relationship between the "local rating" and the distant viewership figure, because the predicted distant viewership figure is a *product* of the imputed local viewership rating.

C. By Dr. Gray's own admission, his methodology fails to measure "relative market value" according to CSO/SSOs, the sole criterion governing distribution.

38. According to Gray's written testimony, he constructed a methodology that attempts to assess "relative market value". According to Gray:

> "Relative market value corresponds to the price at which the right to retransmit a program carried on a distant broadcast signal would change hands between a willing buyer (a CSO or satellite carrier) and a willing seller (a copyright owner), neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

Exh. 8002 at 11.

39. Nothwithstanding his written testimony, Gray actually constructed his methodology on the incorrect assumption that the willing seller is the copyright owner and the willing buyer is a broadcast station, i.e., *not a CSO/SSO*. Tr. at 454-455, 482. Gray's methodology was based on his previously unexplained assumption that in an unregulated market the copyright owner is selling to the broadcaster, and then the broadcaster would license to the CSO/SSO. Tr. at 455-456, 482.

40. Gray's premise finds no basis in either (i) the actual market or (ii) the hypothetical market that the CRB has sought to replicate. Tr. at 456:12-17; 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

41. Gray concludes that viewership ratings are significant because they are what a *broadcaster* considers significant. Tr. at 457.

42. Precedent clarifies that relative market value is to be determined according to the CSO/SSO as the "willing buyer":

> "The devaluation of the Nielsen study is a result of the Panel's consideration of the hypothetical marketplace. In deciding how to determine the relative marketplace value, the only relevant criterion, of the six programming categories in this proceeding, the Panel hypothesized how the distant signal marketplace for cable operators would function in the absence of the section 111 license. . . . [It] is the demand side (i.e., cable operators) that will determine the relative value of programming. Consequently, *evidence that demonstrated how cable operators valued each program category was, in the Panel's view, the best evidence of marketplace value*."
>
> * * *
>
> "The Nielsen study was not useful because it measured the wrong thing.
>
> [T]he Nielsen study does not directly address the criterion of relevance to the Panel. The value of distant signals to [cable system operators] is in attracting and retaining subscribers, and *not contributing to supplemental advertising revenue*. Because the Nielsen study ''fails to measure the value of the retransmitted programming in terms of its ability to attract and retain subscribers,'' it cannot be used to measure directly relative value to [cable system

> operators]. *The Nielsen study reveals what viewers actually watched but nothing about whether those programs motivated them to subscribe or remain subscribed to cable*. Id. at 38 (citations omitted). The Panel observed that apparently Program Suppliers themselves did not believe that raw Nielsen viewing data was determinative of marketplace value . . ."

Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

43. Gray disagrees with the conclusions set forth in the 1998-1999 Cable decision because, unlike what the Judges and the Librarian in that proceeding held, Gray believes that viewership ratings is the "ultimate currency". Tr. at 461:13-22, 378:13-16.

44. Gray is aware that distantly retransmitted viewing has been declining over the last ten to fifteen years, even though distant retransmission fees have gone up the last ten to fifteen years. Tr. at 444:21-445:8. That is, Gray maintains that there is a positive relationship between distant viewing and distant subscribership even though he acknowledges an inverse correlation between distant viewership and distant subscribership.

45. The MPAA has not presented a witness in this proceeding "with knowledge of CSO/SSO programming", and therefore no such witness capable of confirming whether CSO/SSOs consider viewership ratings

significant to their decision to transmit a program, no different than in the 2000-2003 cable proceeding (Phase I). 78 Fed. Reg. 64984, 64992, fn. 28.

46. Gray prefers his paradigm to the precedent expressed in the 1998-1999 Cable decision, and believes that his paradigm is better. Tr. at 465:9-15.

D. Dr. Gray disregards the premise of the "Program Suppliers" program categorization, and his own stated premise, by injecting impermissible factors into his analysis that have a "significant" effect on the regression analysis and his predicted distant viewership.

47. According to Gray's written testimony, programming in the Program Suppliers category is "relatively homogenous". Based on this predicate, Gray cited the Judges' 2000-2003 Phase II decision in his written testimony, and explained application of the concept to the valuation of satellite programming:

> "*This relative homogeneity suggests that a rational CSO would not be as concerned with whether different programs would attract different audience segments (compared with more heterogeneous programming*) and therefore such a CSO would rely to a greater extent on absolute viewership levels." 78 Fed. Reg. at 64996. This rationale also applies to satellite carriers since the programs at issue in allocating the 2000-2009 Satellite Royalties are similarly homogenous to the programs at issue in allocating the 2004-2009 Cable Royalties. That is, they consist of the same types of programs considered in the Cable Phase II proceeding with the addition of the same types of Program Suppliers programs airing on ABC, CBS, or NBC.

Exh. 8002 at fn. 21 (emphasis added).

48. Nothwithstanding his written testimony, Gray *actually* constructed his methodology on the premise that all Program Suppliers programming is *not homogeneous*, as is the purpose for the Program Suppliers category, and attributes "significantly" different values based on the characterization of programming appearing in Tribune Media data. Tr. at 437:24-441:8; Exh. 8002 at 28.

49. Exh. 8002, Appendices D-1 and D-2 at 52, 57-58, reflect the regressions based on twenty-five varieties of Program Suppliers programming other than sports or religious programming. Dramatic differences exist in the multiples applied to different types of Program Suppliers programming. For example, "Health" programming is valued at "-2.436333" versus "Music" programming at "0.905276". Id. at 52.

50. In addition to utilizing *homogeneous* Program Suppliers programming as *heterogeneous* programming types, and factoring them differently, Gray also factored certain "station affiliations" into his regression analysis. Tr. at 441:9-443:16; Exh. 8002, App. D-1 and D-2 at 51, 57.

51. Three "station affiliation" alternatives were factored in Gray's regression analysis: network, CW, Independent. Id. Ostensibly, Gray

factored in "station affiliation" to his regression analysis *only* because "it was information in the Tribune data", not because he had any particular basis for making such distinction. Tr. at 443:13-16. However, Gray provided no explanation in either his written or oral testimony as to *why* he made the three particular distinctions, when the Tribune data does not separate station affiliations out according to only those three distinctions.

52. Exh. 8002, Appendices D-1 and D-2 at 51, 57, reflect the regressions based on three different categories of "station affiliation". Dramatic differences exist in the multiples applied to different types of "station affiliation". For example, "Independent" station affiliation is valued at 0.283036, whereas "Network" is valued at -0.433309. Id. at 51.

53. While not contending a "causal" relationship between local ratings and distant viewership according to "program type" and "station affiliation" metrics, Gray conceded that they "significantly affect" the predicted distant viewership (i.e., "attributed value"). Tr. at 446:9-21.

E. "Zero Viewing" levels in the Nielsen data has increased since the 1993-1997 cable decision (Phase I). Despite an edict from the Librarian, no effort has been made to have a statistical expert explain the cause of the "zero viewing", or to explain the effect on Dr. Gray's methodology. No efforts have been made to reduce the "zero viewing" in the Nielsen raw data.

54. Lindstrom asserted in his written testimony that:

> "One concern raised in past Phase II proceedings was the so-called "zero viewing" instances that appeared in Nielsen's custom analysis of Nielsen diary data. . . . *[T]he appearance of these "zero viewing" instances is consistent with what I would expect to find* in a custom analysis of viewing to distant signals by cable or satellite subscribers."

Exh. 8001 at 8 (emphasis added).

55. Notwithstanding his written testimony, Lindstrom admitted that he did not look at or calculate levels of zero viewing in the Nielsen data, nor was directed to do so. Exh. 8001 at 331:23-332:5.

56. In the 1993-1997 cable proceedings (Phase II), the Librarian found that 73% of the distant retransmissions measured by Nielsen demonstrated "zero viewing", i.e., Nielsen projected that on a nationwide basis no persons were watching retransmitted programming 73% of the time. With one exception (WTBS), zero viewing on a station-by-station basis varied dramatically, from 26% to 96% of all measured broadcasts. Eight of 82 stations were attributed zero viewing for more than 90% of their broadcasts, including WCBS, the New York City affiliate of CBS. WGN was attributed with 52% zero viewing. Three other superstations had zero viewing ranging between 26% and 62%. 66 Fed. Reg. 66433, at 66449-50 (Dec. 26, 2001).

57. Despite performing no calculations of zero viewing, Lindstrom testified that he is aware of and fully expects that the levels of zero viewing has actually *increased* over time. Exh. 8001 at 357.

58. Gray testified that there is a "reasonably high incidence" of zero viewing in both the Nielsen 2000-2003 diary data and Nielsen 2008-2009 People Meter data. Tr. at 418:20-419:3.

59. As regards the Nielsen 2000-2009 local ratings data, Gray initially testified that the incidence of zero viewing was "not the same magnitude" as the Nielsen 2000-2003 diary data and 2008-2009 People Meter data, but could not articulate the levels. Tr. at 419:8-19. Despite this assertion, and his assertion that "more data is better, almost always", Gray subsequently testified that he had not actually calculated the incidence of zero viewing for the 2000-2009 local ratings data. Tr. at 396:12-14, 421:8-14.

60. Gray acknowledged that for Nielsen distant diary data, only sixteen weeks of sweeps data was utilized, with approximately 80% average zero viewing. The remaining 36 weeks were accorded no distant viewing. Mathematically, while this constitutes 94% zero viewing (16 weeks x .8 plus 36 weeks x 0.0 / 52 = 94% zero viewing), Gray refused to acknowledge such fact, contending that one "could not count missing information as zeros". Tr.

at 427:17-431:16. Notwithstanding, Gray acknowledged that in his methodology the "zeros are not discarded", and are averaged in with the positive figures. Tr. at 475:3-11.

61. In the 1993-1997 cable proceeding (Phase II), the Librarian noted that:

> "Lindstrom, who is not a statistician, clarified that attribution of "zero" viewing does not mean that no persons were watching, only that no diaries recorded viewing . . .
>
> * * *
>
> Accepting this and other testimony of Mr. Lindstrom at face value, we find that it does not even begin to explain the enormous discrepancies described above regarding the crediting of "zero" viewing hours. There is little if any evidence in this record that these high credits of "zero" viewing hours were offset in 1997 by credits of excessively high units of viewing hours. Thus, we are left with a record that more than merely suggests that the MPAA methodology is significantly defective in the manner in which it credits "zero" viewing hours."

66 Fed. Reg. at 66450 (Dec. 26, 2001).

62. In the 1993-1997 cable proceeding (Phase II), the Librarian noted that:

> "In the future, if MPAA continues to present a Nielsen-based viewer methodology, it needs to present convincing evidence, *backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of the results of the survey*. In addition, *MPAA needs to take steps to improve the measurement of broadcasts*

> *in the survey to reduce the number of zero viewing hours*, thereby increasing the reliability of its study."

Id. (emphasis added).

63. Lindstrom is not a statistician, does not claim to be an expert in statistics, and claimed to give no expert statistical testimony in this proceeding. Tr. at 288:3-7, 360.

64. Lindstrom failed to articulate any steps taken to reduce the number of zero viewing hours appearing in the Nielsen data. Tr. at 355:4-356:19.

65. Lindstrom could not articulate any means by which the Nielsen data presented in the current proceeding differed from the Nielsen data offered in the 1993-1997 cable proceeding. Tr. at 356:24-357:7.

66. Gray made no attempt to either explain the cause of "zero viewing", explain the effect on the MPAA methodology, and presented no information demonstrating any efforts made by Nielsen to reduce the "zero viewing" in the Nielsen raw data. Exh. 8002; Tr. at 370-488.

67. The distribution order in the 1993-1997 cable proceedings (Phase II) was vacated as "moot" in order to facilitate the parties' settlement. Notwithstanding, the order clarified that it "should not be construed as a

repudiation of the reasoning in the December 26, 2001 Recommendation and Order." 69 Fed. Reg. 23821, 23822 (Apr. 30, 2004).

F. The Gray methodology suffers from the identical deficiencies alleged against methodologies previously presented by IPG.

68. The IPG methodology submitted in the initial round of these proceedings also included as indicia (i) distant subscribers to the retransmitted station, (ii) the time of day of the broadcast, and (iii) the fees paid by CSO/SSOs in the year of broadcast. *Order Reopening Record* at 6; Tr. at 435:13-436:14.

69. The *Order Reopening Record* criticized IPG's use of the foregoing indicia:

> "In the *2000-03 Distribution* determination, the Judges evaluated these same proposed indicia of value and found them wanting. "[T]he IPG Methodology uses factors that tend to treat as similar programs that are distantly retransmitted at the same time of day, run for the same number of minutes per program or that appear on the same station."
>
> "The Judges again criticized IPG's reliance on these indicia of value in the *1998-99 Distribution* proceeding."

Order Reopening Record at 6.

70. The Gray methodology, particularly when local ratings data is imputed, tend to treat as similar programs that are distantly retransmitted at

the same time of day, run for the same number of minutes per program or that appear on the same station, i.e., the same criticism levied against IPG in this proceeding.

71. In the event that Gray did not have local viewership ratings data for the sampled stations for which he sought to predict distant viewership, Gray imputed the retransmitted broadcasts with the average local viewership rating for programs of the same program type (according to Tribune data) that are being broadcast during one of six dayparts. Exh. 8002 at fn. 41.

72. In the 1993-1997 cable royalty proceeding (Phase II), IPG was criticized for utilizing only six daypart factors because that was considered too general:

> "While we acknowledge that obtaining specific daypart data from Nielsen is costly, the dayparts culled by IPG from the [Nielsen] *1998 Report on Television* are far too broad because they ignore variations in viewing within dayparts."

66 Fed. Reg. 66433, 66453 (Dec. 26, 2001).

73. In response, in the 2000-2003 cable proceedings (Phase II), IPG used 48 half-hour daypart factors, but was then criticized for *any* use of such daypart factor. While concluding that IPG's use was "not irrational", the Judges nonetheless found IPG's use of a daypart factor, in lieu of "per

program viewership”, to be “unreasonable”. 78 Fed. Reg. 64984, 65002 (Oct. 30, 2013).

74. Gray provides no explanation or testimony why he imputed a local rating based, *inter alia*, on only six dayparts, when data for 96 quarter hours existed was in his possession, and such data further existed for each day of the week. In fact, Gray provides no explanation or testimony why he imputed a local viewership rating based, *inter alia*, on daypart viewership, particularly after the ruling in the 2000-2003 cable proceeding (Phase II), in which he participated. Exh. 8002; Tr. at 370-488.

G. The Gray methodology violates a clear edict against mixing Nielsen Diary data and Nielsen Metered Viewing data.

75. In order to assert a relationship between local ratings and distant viewership, the Gray methodology utilized two disparate types of Nielsen data – diary data and meter data. Exh. 8001 at 4-7; Exh. 8002 at 17-19.

76. In prior proceedings, a clear edict was set forth that doing so invalidated the purported results of any analysis relying thereon. In fact, such determination was at the hand of the MPAA’s own witness, Paul Lindstrom:

> “Mr. Lindstrom observed that mixing meter data with diary data could invalidly alter the percentage viewing shares of each Phase I program type.”
>
> * * *
>
> “Mr. Lindstrom stated that it was invalid to mix metered viewing

with diary viewing. We accept Mr. Lindstrom's statement."

1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15291, 15300 (Apr. 27, 1992).

77. In fact, the MPAA was criticized in the 1993-1997 cable proceeding (Phase II) for submitting a study that engaged in the *identical* methodological mistake:

> "The CARP accepted the following criticisms of MPAA's approach:
>
> There are unanswered technical questions regarding relative error rates and mixing diary and meter data."
>
> * * *
>
> "[The CARP] listed eight specific criticisms of the MPAA approach:
>
> There are unanswered technical questions regarding relative error rates and mixing diary and meter data."

See 66 Fed. Reg. 66433, at 66437, 66448 (Dec. 26, 2001).

78. The only witness with sufficient familiarity with Nielsen data, Paul Lindstrom, has set down one clear edict both in his prior testimony - - do not mix the results of Nielsen meter and diary measurements. Despite the availability of Mr. Lindstrom's informed opinion, Dr. Gray elected to breach this basic tenet of statistical validity and chose to mix methodologies in two critical ways. Exh. 8002 at 17-19.

79. According to the testimony of Gray, the Gray methodology relies on Nielsen diary data collected during 2000-2003 "sweeps" periods. Notwithstanding, the Gray methodology then relies on Nielsen National

People Meter data for 2008-2009. Unexplained in any evidence or testimony is how two disparate types of Nielsen *distant* data can be jointly utilized to establish a consistent type of distant viewership figure, which figure is then used as a variable to purportedly establish a positive correlation between Nielsen local ratings metered data and distant viewership.

80. The mixing of diary and meter studies, as performed by Gray, was done without the involvement of Nielsen. Nielsen provided 2000-2003 diary data as part of a special study, then Nielsen subsequently provided 2008-2009 National People Meter data, as part of a different special study. Exh. 8001 at 4-7. Gray subsequently utilized the results thereof in a manner not contemplated by Nielsen. Exh. 8002 at 17-19.

III. SDC METHODOLOGY

81. Dr. Erkan Erdem ("Erdem") provided both written and oral testimony on behalf of the SDC. Exh. 7000; Tr. at 48-158.

82. John Sanders ("Sanders") provided both written and oral testimony on behalf of the SDC. Exh. 7001; Tr. at 159-262.

A. The Erdem methodology is the same methodology as was presented in the initial round of this proceeding, but utilizes additional generalized data, and data that Erdem has no foundational familiarity with.

83. Erdem presents the same methodology as proffered in the initial round of these proceedings, buttressed by additional data. In response to the *Order*

Reopening Record, the SDC obtained additional Nielsen national average local ratings data for 1999-2003, taken from the "R-7" summary page of various Nielsen *Report on Devotional Programs*, and utilized 2000-2003 MPAA distant "HHVH" data obtained through discovery in this proceeding. Exh. 7000 at 17-18; Tr. at 62:14-24. No additional data was obtained relating to 2004-2009. Exh. 7000 at 17-18.

84. Erdem and Sanders asserted that Nielsen distant data does not exist for 2004-2009, and that Nielsen expressly informed the SDC of such fact. Tr. at 62:14-24, 122:10-16, 181:17-24, 237:12-239:20; Exh. 7001 at 14. By contrast, Lindstrom (Nielsen) testified that a National People Meter *distant* viewing analysis could have been performed for each of the years 2000-2009 and, in fact, Nielsen performed a distant viewing analysis on behalf of the MPAA for 2008-2009. Tr. at 310:6-311:13. When confronted with such fact, Sanders recanted and stated that he could not recall the specifics as to why he said that Nielsen data was not available. 238:15-239:20.

85. Erdem relies on a 2000-2003 MPAA distant HHVH database that he did not develop, design, or commission, but rather obtained through discovery from the MPAA in this proceeding. Tr. at 62:14-24. From a

foundational standpoint, Erdem has insufficient familiarity with the database.

86. In the initial round of this proceeding, the local ratings measurements that Dr. Erdem employed were derived from the "R-7" summary page of Nielsen *Report of Devotional Programs* for the "sweeps" month of February in each year from 1999 through 2003, and each of the four sweeps periods in each year from 2004 through 2009. The "R-7" page of the *Report of Devotional Programs* is a national local ratings summary page, however detail pages in the *Report of Devotional Programs* reflect local ratings of each program on a station-by-station basis. Exh. 7005 (*Cf*. "R-7" page *with* "NSI Average Week Estimates"). In these remand proceedings, Erdem utilizes national averages of local ratings from all four "sweeps" periods during 1999 and 2004-2009, three sweeps periods during 2000, and two sweeps periods during 2001, 2002 and 2003. Exh. 7000 at 3-4.

87. Erdem presents a viewership-based methodology whereby (i) a program's national averages of local ratings, are multiplied against (ii) "the number of subscribers for channels the relevant SDC and IPG programs are broadcast on" in order to attribute the program with a distant viewership variable. Exh. 7000 at 15 ("Step 2").

88. Erdem relies on two major data sets in order to attribute a distant viewership variable: Nielsen sweeps local ratings data, and Cable Data Corporation data. Tr. at 53:12-54:4. In his calculations, Erdem "does not rely on market level data", i.e., station-by-station or broadcast-by-broadcast data. Rather, Erdem relies on national average local rating measure and, apparently, the aggregated subscribers for retransmitted stations on which a program appears. Tr. at 55:7-11, 115:1-6, 119:7-11; Exh. 7000 at 15 ("Step 2").

89. The Nielsen national average local rating is combination of ratings from distantly retransmitted stations and non-distantly retransmitted stations, and ratings attributable to stations with varying numbers of retransmitted households. See, e.g., Exh. 7005 ("R-7" attachment). With the Nielsen national average local rating, there is no way to determine if a higher rating was derived from a station with *de minimus* distant subscribers or extraordinarily high distant subscribers.

90. The local ratings measurements utilized by Erdem in the Erdem methodology are national average ratings derived exclusively from the "R-7" pages appearing as part of each *Report of Devotional Programs*. Although the "NSI Average Week Estimates" appearing as part of each

Report of Devotional Programs reflects local ratings on a station-by-station basis, i.e., more specific local ratings data, such information was not utilized by the Erdem methodology in order to either (i) establish a local ratings/distant viewership correlation, or (ii) calculate and attribute a distant viewership value. Tr. at 55:7-11, 115:1-6, 119:7-11. Rather, the Erdem methodology relies on the more generalized national average ratings data. Id.

91. The "national averages of local ratings for a program" that is the first factor relied on by Erdem to attribute a distant viewership value are unreported by Nielsen for certain devotional programs. Exh. 7000 at 14 (see "Step 1"). Consequently, in such circumstances, Erdem "imputes the missing rating information". Id. Erdem performed this task utilizing information contained in Nielsen local ratings data, without the assistance of Nielsen personnel, purporting that such information could be derived exclusively from the "R-7" page. Id.; Tr. at 112:22-113:23.

92. To confirm the validity of using local ratings to attribute distant viewership, Erdem purported to compute the correlation between local ratings and distant viewership of the same programs using local ratings and

distant viewership data from 1999-2003. Exh. 7000 at 19-20; Tr. at 64:18-21.

B. The SDC relies on a vastly smaller amount of data to establish a purported local ratings/distant viewership correlation than was *already rejected* when proffered by the MPAA in the initial round of this proceeding.

93. The predicate of the Erdem methodology is that there is a positive correlation between local ratings and distant viewership. Tr. at 64:18-65:2, 74:5-19, 100:20-23. The SDC has no distant viewership data for 2004-2009. Supra. Ergo, no differently than the MPAA in the initial round of this proceeding, the SDC has no data demonstrating a correlation between local ratings/distant viewership for the six-year period 2004-2009. *Order Reopening Record* at 2-4. The MPAA methodology in the initial round of this proceeding, to the extent that it relied on 2000-2003 data to assert a 2004-2009 correlation, was rejected on precisely such basis. Id.

94. The MPAA methodology rejected in the initial round of this proceeding relied on data for all four "sweeps" periods of 2000-2003 in order to establish a purported positive correlation, whereas the SDC relies on only four periods during 1999, three periods during 2000, and two sweeps periods during each of 2001, 2002 and 2003. Exh. 7000 at 3-4.

95. The MPAA methodology rejected in the initial round of this proceeding purported to calculate a positive correlation based on *thousands* of Program Supplier programs, whereas the Erdem methodology asserts such correlation based on an unknown number of Devotional Programming programs. Exh. 7000 at 20. Whereas Erdem indicated that he utilized sixty (60) data points in order to purportedly substantiate the positive correlation, such figure counted each program for each year as a separate data point, creating the possibility that only twelve (12) programs were the basis of Erdem's asserted correlation over the five-year period of 1999-2003. Id.; Tr. at 129:2-130:9.

96. The SDC alone is making claim to 132 separate programs, each of which for each year 1999-2003 could have been deemed a separate "data point" according to the definition utilized by Erdem, and could have been deemed a "data point" separately for both cable and satellite, a total of 1,320 potential data points (132 programs x 5 years x 2 retransmission streams = 1,320 potential data points). Exh. 7001 at Appendix C. According to Erdem, in order for his local ratings/distant viewership correlation to be too few to be credible for all devotional programming from 1999-2003, there

would have to be “less than 10” datapoints, i.e., an average of two datapoints per year, for both cable and satellite royalties. Tr. at 134:5-8.

C. Dr. Erdem misrepresented the existence of a positive correlation between local ratings and distant viewership by revealing in oral testimony that his calculations are based on “annual averages” of multiple broadcasts of a program, not singular broadcasts.

97. For the first time, in his oral testimony Erdem revealed that his asserted local ratings/distant viewership correlation is not between *broadcasts* for which he has both local ratings data and distant viewership data, but *annual averages of broadcasts* for programs. *Cf.* Exh. 7000 at 20 *with* Tr. at 77:16-78:11, 129:2-130:9.

98. For example, presume a particular program is broadcast and retransmitted on 100 occasions (broadcasts 1-100). Next, presume that broadcasts 1-50 reflect positive *local* measurements, broadcasts 51-100 reflect positive *distant* measurements, and all other measurements are unmeasured or otherwise reflect “zero viewing”. The Erdem methodology averages the fifty positive *local* measurements across all 100 broadcasts, and averages the fifty positive *distant* measurements across all 100 broadcasts, then compares those local/distant values with those of other programs during the same years. Tr. at 117:15-118:4, 121:4-122:6.

99. The foregoing construct does not support the predicate of the Erdem methodology, i.e., that there is a positive correlation between local ratings and distant viewership on a *broadcast-by-broadcast* basis. In fact, the foregoing example would demonstrate an inverse correlation, but by averaging positive figures on an aggregated basis, Erdem has asserted that a positive correlation exists.

100. Further, the SDC made such comparisons only for 1999-2003, i.e., those years in which *distant* retransmission data has been obtained in these proceedings from the MPAA, and asserts that a positive correlation (based on annual averages) exists based on sixty (60) data points. That is, according to Erdem, from 1999-2003, an average of twelve devotional programs appeared during a given year, and the annual average of local measurements correlate with the annual average of distant measurements. Tr. at 77:16-78:11, 129:2-130:9.

D. The Erdem methodology calculations are ambiguously described, and suggest Erdem's failure to calculate the number of broadcasts of a retransmitted program.

101. In order to attribute a distant viewership figure, Erdem multiplied the (reported and imputed) national average annual local rating of a program by

"the number of subscribers for channels" on which the IPG/SDC program is broadcast. Exh. 7000 at 15 ("Step 2").

102. There is no evidence or testimony to demonstrate that Erdem accounted for the number of broadcasts of a program on a station when calculating "the number of subscribers for channels" on which the program is broadcast. That is, no evidence or testimony demonstrates that Erdem valued a program differently if it had been retransmitted on a station 100 times versus 1,000 times. Exh. 7000; Tr. at 48-158.

E. The Nielsen local ratings data on which the SDC rely does not measure all devotional programming compensable in this proceeding.

103. The Nielsen local ratings data on which the Erdem methodology relies fails to measure all devotional programming, and omits significant IPG-represented programming. Exh. 7000 at 6-7, 16 (fn. 25); Tr. at 59:1-9., 105:8-13. As acknowledged by Erdem, even IPG-represented programs appearing on WGN were not measured by Nielsen:

> "James T. Meeks" and "Reverend Meeks" in 2001 and "Billy Graham" and "Billy Graham Youth Special" in 2002-2003 are unrated programs, apparently because they were not regularly scheduled broadcasts, *and hence carry no value in my methodology because I have no evidence of viewership*.

Exh. 7000 at fn. 25 (emphasis added).

104. Sanders acknowledges that the Nielsen *Report of Devotional Programs* does not measure all programs, and excludes specials, but contends that such programs are insignificant in value because they are unpredictably scheduled. Tr. at 239:21-240:17. Nonetheless, Sanders has done no analysis to confirm such theory. Tr. at 240:18-25. The Erdem methodology accords no value to any program unmeasured by Nielsen. Tr. at 241:3-7.

105. The Erdem methodology does not attempt to discern the values for the unmeasured broadcasts, even unmeasured broadcasts known to have appeared on WGN, the most significantly retransmitted station. Id.; Tr. at 125:23-126:2. Erdem attempts to rationalize the omission of certain identified unmeasured broadcasts by a "volume" comparison of IPG and SDC unmeasured broadcasts. Exh. 7000 at fn. 25. Such "volume" comparison is made even though Erdem asserts that "volume is not a reliable methodology to allocate royalties because it does not accurately measure relative market value". Exh. 7000 at 9.

106. Because the Erdem methodology fails to measure all devotional programming, and omits significant IPG-represented programming from its

analysis, the Erdem methodology is not a comprehensive comparison of IPG and SDC programming.

F. In order to establish a local ratings/distant viewership correlation for *satellite* retransmissions, Erdem relied on 2000-2003 distant *cable* data.

107. Erdem testified that in order to establish a local ratings/distant viewership correlation for 1999-2003 broadcasts, he compared Nielsen national average local ratings data and an *imputed* distant rating. Tr. at 107:10-14. The distant rating was imputed by using MPAA distant HHVH figures for a program as a numerator, and CDC distant subscribers for a program as a denominator. Tr. at 107:17-22. The questionable logic aside, and the questionable need to even make comparison of a distant "rating" when a distant HHVH figure already existed for comparison, Erdem testified that the MPAA distant HHVH figures that he utilized were "an average" of distant cable and satellite HHVH figures. Tr. at 107:2-10. No evidence or testimony exists as to why Erdem would blend the distant *cable and satellite* HHVH figures when attempting to calculate and impute a distant *satellite* rating. Exh. 7000; Tr. at 48-158.

G. "Zero Viewing" levels in the Nielsen data utilized in the Erdem methodology is substantial. Despite an edict from the Librarian, no effort has been made to have a statistical expert explain the

cause of the “zero viewing”, or to explain the effect on Dr. Erdem’s methodology. No efforts have been made to reduce the “zero viewing” in the Nielsen raw data.

108. “Zero viewing” is the percentage occurrence of unmeasured viewing on a *broadcast-by-broadcast* basis. 66 Fed. Reg. 66433, at 66449-50 (Dec. 26, 2001). Notwithstanding, Erdem redefines “zero viewing” as only those circumstances in which the *aggregate* of a program’s broadcasts reflect no viewing. Tr. at 116:10-117:9. Erdem addresses the “zero viewing” issue only by aggregating information until the zeros are averaged in with positive figures. Tr. at 117:15-118:4, 121:4-122:6.

109. By the reliance on only “sweeps” local ratings data, the Erdem methodology only considers ratings measurements applicable to 16 weeks a year, at most. Tr. at 104:6-13. Consequently, for 1999 and 2004-2009 “zero viewing” automatically exceeds 69%; for 2000 “zero viewing” automatically exceeds 77%; for 2001, 2002 and 2003 “zero viewing” automatically exceeds 84%.

110. Because the Nielsen local ratings data utilized by Erdem does not reflect *broadcast-by-broadcast* measurements, such data does not allow for a “zero viewing” percentage calculation. Exh. 7005. Notwithstanding, even when Nielsen local ratings data is aggregated on a *station-by-station* basis,

thereby disguising *broadcast-by-broadcast* levels of “zero viewing”, significant “zero viewing” issues are reflected. Id. For example, review of the NSI Average Week Estimates attached to Exhibit 7005 demonstrates aggregated positive viewing measurements on only 71 stations carrying “Dr. D. James Kennedy” during the July 1999 “sweeps” period, and aggregated “zero viewing” on 111 stations carrying such program (as denoted by “<<”). See Exh. 7005 (“NSI Average Week Estimates” for “Dr. D. James Kennedy” for “July 1999” at column 11. Such Nielsen local ratings data reflects no local viewing by *any* household on 61% of the stations carrying “Dr. D. James Kennedy” during the July 1999 “sweeps” period (111/182 = 61%).

111. Devotional programming broadcasts constitute a small percentage of the aggregate television broadcasts. Erdem and Sanders both acknowledge that the “zero viewing” issue is exacerbated when considering a smaller number of broadcasts, e.g., such as devotional programming category broadcasts. Tr. at 114:14-19, 224:24-225:23. Between 2004 and 2009, i.e., the period of time in which the SDC has no *distant* viewership data, the number of Nielsen rated programs appearing in the Nielsen *Report on Devotional Programs* dropped from 54 to 33. Exh. 7001 at p. 10; Tr. at

224:7-14. Sanders believes that if no Nielsen local ratings measurement occurs it is because the programming doesn't generate sufficient viewing, not that it is an issue with Nielsen having an insufficient number of measuring points. Tr. at 226:13-228:23.

112. Nonetheless, Sanders has not examined the zero viewing issue, and testified that he "does not recall" attempting to calculate zero viewing in the Nielsen data. Tr. at 225:24-226:6. Despite contending that "any project has got to be looked at in terms of the full universe of data that is available", Sanders thinks any such calculation would be of "incremental benefit". Tr. at 226:7-17, 236:14-16.

113. In the 1993-1997 cable proceeding (Phase II), the Librarian noted that:

> "In the future, if MPAA continues to present a Nielsen-based viewer methodology, it needs to present convincing evidence, *backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of the results of the survey*. In addition, *MPAA needs to take steps to improve the measurement of broadcasts in the survey to reduce the number of zero viewing hours*, thereby increasing the reliability of its study."

66 Fed. Reg. at 66433, 66450 (Dec. 26, 2001).

114. Sanders is not a statistician, does not claim to be an expert in statistics, and claimed to give no expert statistical testimony in this proceeding. Tr. at 164:20-23, 169:3-4.

115. Erdem and Sanders made no attempt to either explain the cause of "zero viewing", explain the effect on the SDC methodology, and presented no information demonstrating any efforts made by Nielsen to reduce the "zero viewing" in the Nielsen raw data. Exhs. 7000, 7001; Tr. at 48-262.

116. The distribution order in the 1993-1997 cable proceedings (Phase II) was vacated as "moot" in order to facilitate the parties' settlement. Notwithstanding, the order clarified that it "should not be construed as a repudiation of the reasoning in the December 26, 2001 Recommendation and Order." 69 Fed. Reg. 23821, 23822 (Apr. 30, 2004).

H. The SDC still have no basis on which to elect a viewership-based methodology.

117. In developing the Erdem methodology, Erdem testified that he "does not recall" whether any CSO has ever testified that they looked at viewership ratings when making a decision whether to retransmit programming. Tr. at 100:12-17. Rather, Erdem just "consulted with John Sanders". Tr. at 99:20-100:1.

118. Sanders testified that he has never been engaged by a CSO or SSO to advise as to what signal to import. Tr. at 235:9-236:1. Sanders was admitted as an expert on media interest valuation, but not valuation of the retransmitted programming based on CSO and SSO motivations. Tr. at 164:20-23, 169:3-4, 271:16-20. The Judges allowed Sanders' testimony to the extent that it addressed his "general" expertise in valuation. Tr. at 273:16-22. Sanders asserts that it is "commonsense" that "viewing begets subscribership". Tr. at 175:14-21.

119. Erdem acknowledges that he "doesn't have the information" to demonstrate that subscribership is tied to viewership, but nevertheless contends "it has got to be tied to viewership", and that viewership is a proxy for subscribership. Still, Erdem concedes that "without more data, it is hard to get into the weeds of that analysis." 134:18-138:11. Further, Erdem acknowledges that CSOs do not look at viewership ratings but asserts that there is no better data to distinguish between the value of programs. Tr. at 93:8-95:6.

120. Sanders understands that distant cable subscribership has gone up gradually since 1999. Tr. at 213:4-8. Exhibit 9032 is the *Report of Receipts* from the Licensing Division, and demonstrates that retransmission royalties

have gradually increased since 1999. Exh. 9032. Notwithstanding, Sanders' written testimony reflects that distant viewership has decreased between 1999 and 2009. Exh. 7001 at 6-9 (Figures 1, 2, and 3); Tr. at 220:19-221:6. That is, Sanders (and the Erdem methodology) maintains that there is a positive relationship between distant viewing and distant subscribership even though he acknowledges an inverse correlation between distant viewership and distant subscribership.

I. The SDC has no evidence to demonstrate that local ratings are a valid indicator of distant viewership, and no evidence to demonstrate that ratings for cable retransmitted broadcasts are a valid indicator for satellite retransmitted broadcasts.

121. Erdem asserts that he has "no reason to believe that ratings in a local market are different than ratings in a distant market". Tr. at 101:7-13; Exh. 7000 at 13. Notwithstanding, Erdem acknowledges that the lineup of programming that is the basis of ratings in a local market is different than the lineup of programming that would be the basis of ratings in a distant market. Tr. at 101:14-19.

122. Erdem asserts that he has "no reason to believe that the ratings for a cable system will differ from the ratings for a satellite system". Exh. 7000 at 13. Notwithstanding, Erdem acknowledges that the lineup of programming

that is the basis of ratings for distantly retransmitted cable broadcasts is different than the lineup of programming that would be the basis of ratings for distantly retransmitted satellite broadcasts. Tr. at 101:21-25. Further, Erdem acknowledges that he has not investigated the question. Tr. at 102:3-5.

PROPOSED CONCLUSIONS OF LAW

123. Under the Copyright Act, the amount of copyright royalty fees a cable system operator pays for retransmission of copyrighted works on broadcast television stations is determined by regulation, rather than through negotiation between a buyer and seller. *Distribution of the 2004 and 2005 Cable Royalty Funds*, Distribution Order, Docket No. 2007-3 CRB CD 2004-2005 (Phase I), 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010) ("*2004-2005 Phase I Order*"). The fees are based principally on the number and the types of signals retransmitted and the revenues of the cable system, rather than on the content of the signals. 17 U.S.C. §§ 111(c)-(d). All cable systems must pay a royalty fee, generally the amount required for retransmission of DSE, regardless of whether they retransmit a signal. 17 U.S.C. § 111(d). A cable system operator that chooses to retransmit a signal must retransmit the entire signal, without modification. 17 U.S.C. § 111(e). Retransmission of

noncommercial educational stations, comprising the entirety of the PTV category, count as only one-quarter of a DSE for purposes of calculating fees, and some are exempt. 17 U.S.C. § 111(f)(5).

124. This statutory (i.e., compulsory) license exists to "substitute for free market negotiations because of a perceived intractable 'market failure' inherent in the licensing of copyrights—particularly the assumed prohibitively high 'transaction costs' of negotiating a multitude of bilateral contracts between potential sellers and buyers." *Distribution of 1998 and 1999 Cable Royalty Funds*, Final Distribution Determination, Docket No. 2008-1 CRB CD 98-99 (Phase II), 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015) ("*1998-1999 Phase II Determination*").

125. The Copyright Act does not set forth a statutory standard for cable or satellite royalty allocations. *2004-2005 Phase I Order*, 75 Fed. Reg. at 57065. In prior proceedings, the Judges and their predecessors have "chosen to embrace the relative marketplace value of the programming retransmitted as the sole criterion governing distribution." *Distribution of 1998 and 1999 Cable Royalty Funds (Phase I)*, Final Order, 69 Fed. Reg. 3606, 3608 (Jan.

26, 2004) ("*1998-1999 Phase I Determination*"); *2004-2005 Phase I Order*, 75 Fed. Reg. at 57065.

126. The relevant standard for "fair market value" is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." *See Distribution of the 2000-2003 Cable Royalty Funds*, Final Distribution Order, 2008-2 CRB CD 2000-03 (Phase II), 78 Fed. Reg. 64984, 64992-93 (Oct. 30, 2013) ("*2000-2003 Phase II Order*") (quoting *U.S. v. Cartwright*, 411 U.S. 546, 511 (1973)). In this hypothetical market, the "price" is the amount that the "willing buyer" (the cable system operator or satellite system operator) would pay the "willing seller" (the copyright owner or exclusive licensee of the program being retransmitted) for the "property" (the right to retransmit the broadcast program in a distant market), if neither were under a compulsion to buy or sell, and if both had reasonable knowledge of the relevant facts. *Id.*

127. Because the compulsory license "substitutes for marketplace negotiations in the buying and selling of broadcast programming, there is no real marketplace for those broadcast programs retransmitted by cable or

satellite systems. *1998-1999 Phase I Determination*, 69 Fed. Reg. at 3608. The Judges are therefore tasked with selecting an appropriate mechanism by which to estimate the relative price at which a "willing buyer" would pay a "willing seller" for the right to distantly retransmit broadcast programs in a hypothetical market without such statutory limitations and compulsions. *Id.*; *see also 2004-2005 Phase I Order*, 75 Fed. Reg. at 57065 ("the evidence adduced in this proceeding aims to show how the programming in question would be valued in a hypothetical free market that would exist but for the regulatory regime currently in place.").

128. In so doing, the Judges are required by statute "to act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, Register of Copyrights, copyright arbitration panels. . . and the Copyright Royalty Judges[.]" 17 U.S.C. § 803(a).

129. The legislative history of the Copyright Royalty Distribution Act of 2004 (which replaced ad hoc Copyright Arbitration Royalty Panels with the

Judges of the Copyright Royalty Board), underscores the importance that Congress places on the Judges' statutory obligation to adhere to precedent:

> "[The 2004 Act] addresses the uniform complaints that the CARP decisions are unpredictable and inconsistent . . ."

150 Cong. Rec. 26, H769 (daily ed. Mar. 3 2004) (statement of Rep. Sensenbrenner).

> "There is widespread agreement among copyright owners and users alike that the CARP process is broken. The costs involved are often so high that parties cannot either afford to participate or find that the costs outweigh any potential royalties or efficiencies. The decisions often take too long to issue, and thus create uncertainty and confusion among licensers and licensees alike. Finally, even when decisions do issue, they are often overturned or modified, [and] are inconsistent with precedents."

Id. (statement of Rep. Berman).

> "This legislation that I authored addresses the main problem: frivolous royalty claims, which is a growing trend, as well as decisions made by the copyright panel that are unpredictable and inconsistent."

Id. at H770 (statement of Rep. Smith).

130. The CARP itself had recognized that "a system that imposes substantial burdens on copyright owners would become completely unworkable if such precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly – simply because new decision-makers had different views or different

personal preferences concerning the intrinsic worth of certain programming." *Distribution of the 1998 and 1999 Cable Royalty Funds*, Report of the CARP to the Librarian of Congress, Docket No. 2001-8 CARP CD 98-99 (Oct. 21, 2003) (the "*1998-1999 CARP Report*") at 14.

131. Thus, although prior decisions of the Copyright Royalty Judges and their predecessors are not "cast in stone," the Judges may only vary from them when there are "(1) changed circumstances from a prior proceeding or; (2) evidence on the record before [them] that requires prior conclusions to be modified regardless of whether there are changed circumstances." *1998-1999 Phase I Determination*, 69 Fed. Reg. at 3613-14.

132. As in prior proceedings, the MPAA-sponsored viewership-hours study is "not useful because it measured the wrong thing." *1998-1999 Phase I Determination*, 69 Fed. Reg. at 3613 (citing *1998-1999 CARP Report* at 38). As before, MPAA's viewership-hours study,

> "does not directly address the criterion of relevance to the Panel. The value of distant signals to [cable system operators] is in attracting and retaining subscribers, and not contributing to supplemental advertising revenue. Because the Nielsen study 'fails to measure the value of the retransmitted programming in terms of its ability to attract and retain subscribers,' it cannot be used to measure directly relative value to [cable system operators]. The Nielsen study reveals . . . nothing about whether those programs motivated them to subscribe or remain subscribed to cable."

1998-1999 CARP Report at 38; *see also 2004-2005 Phase I Order*, 75 Fed. Reg. at 57070 (finding MPAA's "advertising based model so far attenuated from the relevant hypothetical market as to offer no basis for reasonable estimates of the relative value of programming on distant signal stations.").

133. Dr. Gray's methodology relies on and integrates three different varieties of Nielsen viewership data. Following the *Order Reopening Record*, the MPAA only added 2008-2009 distant data for purposes of averaging mathematical relationships with 2000-2003 distant data, i.e., data that could only nominally affect Dr. Gray's calculations.

134. The Gray methodology relies on an unreasonably small sliver of data in order to purportedly establish a correlation between local ratings and distant viewership, and such correlation is further problematic because it is premised to an unknown degree between *imputed* local ratings and distant viewership, and with unknown effect between IPG and MPAA programming. Based on this unreasonably small amount of data, the Gray methodology then purports to predict distant viewership, but unreasonably supplants actual measurements of distant viewership with Dr. Gray's prediction of what such data *should* have been.

135. In the course of *imputing* local ratings, Dr. Gray relies on the same criteria as are subsequently used again to predict distant viewership, thereby giving unreasonable double-significance to such criteria (time of day of broadcast, program type).

136. By Dr. Gray's own admission, his methodology fails to measure "relative market value" according to CSO/SSOs, therefore failing to address the sole criterion governing distribution.

137. Dr. Gray unreasonably disregards the premise of the "Program Suppliers" program categorization, and his own stated premise, by injecting impermissible factors (program type, certain types of station affiliation) into his analysis that have a significant effect on the regression analysis and his predicted distant viewership.

138. Pursuant to an edict from the Librarian, any reliance on Nielsen data required the testimony of a statistical expert in order to explain the cause of the "zero viewing", and to explain its effect on Dr. Gray's methodology. Efforts were also required to have been made to reduce the "zero viewing" in the Nielsen raw data. The MPAA failed to present any such evidence, and therefore failed to comply with the Librarian's edict as a precursor for use of the Nielsen data.

139. The Gray methodology suffers from the certain of the identical deficiencies alleged against methodologies previously presented by IPG, and in such respect is also deemed unacceptable.

140. Pursuant to an edict from the Copyright Royalty Tribunal, different types of Nielsen data may not be combined toward the same purpose. The Gray methodology violates this edict against mixing Nielsen diary data and Nielsen metered viewing data by combining three different types of Nielsen data.

141. Dr. Gray's methodology fails to adequately address the issues articulated in the *Order Reopening Record* as to Gray's prior rendition of such methodology.

142. The Erdem methodology is the same methodology as was presented in the initial round of this proceeding, but utilizes additional generalized data, and data that Erdem has no foundational familiarity with.

143. The SDC relies on a vastly smaller amount of data to establish a purported local ratings/distant viewership correlation than was *already rejected* when proffered by the MPAA in the initial round of this proceeding.

144. Dr. Erdem misrepresented the existence of a positive correlation between local ratings and distant viewership by revealing in oral testimony

that his calculations are based on “annual averages” of multiple broadcasts of a program, not singular broadcasts.

145. The Nielsen local ratings data on which the SDC rely does not measure all devotional programming compensable in this proceeding.

146. In order to establish a local ratings/distant viewership correlation for *satellite* retransmissions, Erdem relied on 2000-2003 distant *cable* data.

147. “Zero Viewing” levels in the Nielsen data utilized in the Erdem methodology is substantial. Despite an edict from the Librarian, no effort has been made to have a statistical expert explain the cause of the “zero viewing”, or to explain the effect on Dr. Erdem’s methodology. No efforts have been made to reduce the “zero viewing” in the Nielsen raw data.

148. The SDC still have no basis on which to elect a viewership-based methodology.

149. The SDC has no evidence to demonstrate that local ratings are a valid indicator of distant viewership, and no evidence to demonstrate that ratings for cable retransmitted broadcasts are a valid indicator for satellite retransmitted broadcasts.

Respectfully submitted,

Dated: May 8, 2018

_____/s/______________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2018, a copy of the foregoing was sent by email to the parties listed on the attached Service List, and served by the eCRB system.

________/s/______________
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Certificate of Service

I hereby certify that on Tuesday, May 08, 2018 I provided a true and correct copy of the Independent Producers Group's Proposed Findings of Fact and/or Proposed Conclusions of Law to the following:

MPAA-Represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Devotional Claimants, represented by Matthew J MacLean served via Electronic Service at matthew.maclean@pillsburylaw.com

Signed: /s/ Brian D Boydston